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In the Supreme Court of the United States

NO. 703

OCTOBER TERM, 1924

HENRIETTA MOON, *Appellant,*

vs.

STARLING WHITE TAIL AND THE UNITED STATES, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF OF APPELLANT.

The opinion of the court below is not reported.

STATEMENT.

This case involves the descent of the allotment and inherited lands of Little Soldier, a Ponca Indian. All lands involved in this matter were allotted under the provisions of the General Allotment Act, Act of Congress, February 8, 1887, 21 Stat. L. 388, as amended by Act of Congress, February 28, 1891, 26 Stat. L. 794.

Little Soldier was a member of the Ponca tribe of Indians, as were the appellant, Henrietta First Moon, and the appellee, Starling White Tail. Little Soldier and Henrietta First Moon were born while the Ponca tribe of Indians was in the state of Nebraska, probably seventy years ago. They were married according to the customs of the Ponca tribe of Indians, while the tribe was in the state of Nebraska, and under tribal government exclusively, many years before the allotment of the Poncas. They were removed to their reservation, which is located in what is now the northern part of Oklahoma, about the year, 1877.

At about the time of their removal to Oklahoma and some years after his marriage to Henrietta First Moon, Little Soldier was married to Ella Little Soldier, the sister of Henrietta First Moon, and lived with the two women in plural marriage until the death of Ella Little Soldier, August 17, 1914. Little Soldier and his two wives were allotted under the provisions of the General Allotment Act, *supra,* during the month of October, 1895. Some time after the death of Ella Little Soldier, about January 1, 1915, Little Soldier abandoned Henrietta First Moon, the appellant, and married Alice Eagle White Tail, the mother of Starling White Tail, the appellee, by ceremonial marriage, on August 12, 1915. He was never divorced by the decree of any court from Henrietta First Moon, the appellant, and she bore him eleven children during their married life,

all of whom died before the death of Little Soldier. Little Soldier died March 1, 1919, and Alice Eagle White Tail died about one month thereafter, leaving Starling White Tail, the appellee, as her sole and only heir.

The Secretary of the Interior, by departmental decision handed down under date of September 28, 1923, found the above facts to exist and upon those facts determined that by merely separating from Henrietta First Moon on or about January 1, 1915, the marital relationship which had existed between her and Little Soldier was thereby dissolved, that no decree of court was necessary to dissolve such marital relationship and that the separation, having been in accordance with the rules which the Ponca tribe of Indians had followed for obtaining divorce when their tribal relationship existed and before allotment of the Poncas, was a valid divorce. ~~continued in effect~~ He found that by merely leaving Henrietta First Moon without any cause and for no wrong upon her part, and none was shown in the evidence or found by the secretary to exist, the bands of matrimony which had existed between them for more than forty years were thereby dissolved and that she was not entitled to inherit from him. In this decision the secretary found that after such separation and after Little Soldier's attempted marriage to Alice Eagle White Tail, Henrietta First Moon entered into a marriage ceremony with one Buffalo Chief. But that fact is not relied upon in the secretary's opinion as a ground for deciding as he did. Upon

these facts which the Secretary of the Interior found to exist he determined that as a matter of law, one-half of the allotment and lands of Little Soldier should descend to Starling White Tail, one of the appellees, and the other one-half to some collateral heirs of Little Soldier, and that Henrietta First Moon was not his widow at the time of his death and was not entitled to inherit anything from him. (R. 7-11.)

Henrietta First Moon was dissatisfied with this ruling of the Secretary of the Interior and filed a bill in equity in the District Court of the United States for the Western District of Oklahoma (R. 1), attached a copy of the secretary's findings thereto, as "Exhibit A" (R. 7-11), and in that bill pleads that the secretary misapplied the law to the facts which he found to exist; that upon the facts which he found to exist, he should have found that Henrietta First Moon, at the time of the death of Little Soldier, was his widow and entitled to receive the one-half interest of his estate which the secretary declared in said opinion to descend to Starling White Tail. The bill pleads that Henrietta First Moon and Little Soldier were validly married according to the Ponca Indian tribal customs many years before the allotment of the Poncas and before they became citizens, that some twenty years after their allotment and after they thereby became citizens and subject to the civil and criminal laws of Oklahoma, on or about January 1, 1915, Little Soldier abandoned Henrietta First Moon; that

no divorce was ever granted to either of the parties, and that on August 12, 1915, a marriage ceremony was performed between Little Soldier and Alice Eagle White Tail. The bill pleads that for these reasons Little Soldier was then incompetent to contract the marriage with Alice Eagle White Tail, that said marriage was void, that Henrietta First Moon remained his wife until his death, when she became his widow. The prayer of the bill was that the appellant be decreed to have and hold one-half interest in all the lands owned by Little Soldier at the time of his death; that she be decreed to be an heir to one-half of his estate, the portion she would take as widow under the Oklahoma laws (1921 Comp. Okla. Stat., Sec. 11301, Cl. 2); that the determination of heirship made by the Secretary of the Interior in said estate under said departmental decision be avoided and set aside in so far as the same decrees the appellee, Starling White Tail, to have a one-half interest in the estate of Little Soldier and excludes the appellant, Henrietta First Moon, from any interest in said estate.

The portion of the Oklahoma statute which is cited is as follows:

> "Second. If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or, if he leave both father and mother, to them in equal shares; but if there be no father or mother, then said remaining one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation."

The appellees each filed a motion to dismiss the bill for want of equity (R. 12). The same were argued before Hon. John H. Cotteral, district judge, on the 5th day of March, 1924, were taken under advisement by him and on the 5th day of August, 1924, he entered a decree in the cause (R. 14), to the effect that the court had no jurisdiction to review any act of the Secretary of the Interior in determining heirship of deceased Indians and held that regardless of whether the decision of the secretary was right or wrong, it was final as to both facts and the law in the case. To this ruling the appellant excepted and prosecutes her appeal to this Court.

SPECIFICATION OF ERROR RELIED UPON FOR REVERSAL.

The court erred in holding and decreeing that it had no jurisdiction of the controversy presented by the bill of the appellant, and in ordering and decreeing that the proceeding stand dismissed for want of jurisdiction.

THIS COURT HAS JURISDICTION OF THIS APPEAL.

The jurisdiction of this Court to consider the appeal is based on Section 238 of the Judicial Code (36 Stat. L. 1157). The decision of the court below was based entirely on the assumption that the court had no jurisdiction of the proceeding. This is shown in the printed record as follows:

In the Opinion of the Court. (R. 14.)

In the Order allowing the appeal. (R. 17.)

In the Decree. (R. 13.)

Such showing being made in any one of these places in the record is sufficient to confer jurisdiction upon this Court to review the action of the lower court without further showing being made in the record. The following authorities so hold:

As to the opinion:

City of Chicago, Appt. v. *Darius O. Mills,* 204 U. S. 321, 51 L. Ed. 504, 1st paragraph of syllabus.

As to the order allowing appeal:

Excelsior Wooden Pipe Company, Appt. v. *Pacific Bridge Co.,* 185 U. S. 282, 46 L. Ed. 910.

As to the decree:

Lehigh Valley R. R. Co. v. *Cornell Steamboat Co.,* 218 U. S. 264, 54 L. Ed. 1039; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.,* 185 U. S. 282, 46 L. Ed. 910, 22 Sup. Ct. Rep. 681; *Herndon-Carter Co., Appt.* v. *James N. Norris, Son & Co.,* 224 U. S. 496, 56 L. Ed. 857.

ARGUMENT.

There is but the one proposition presented to this Court for decision, and that is whether the United States District Court would have jurisdiction to overturn the

decision of the Secretary of the Interior when the secretary misapplies the law to the facts which he finds to exist as to the heirship of a deceased Indian. We do not contend that the Court has the right to re-examine questions of fact which were inquired into by the Secretary of the Interior. We admit that his findings of fact made upon the evidence before him are as binding upon this Court as would be the findings of a jury upon a court in a common law action. But we do contend and urge this Court to hold that where the Secretary of the Interior, after making findings of fact, has misapplied the law to the facts which he finds to exist, it is the province of the proper court of equity to review and correct the decision of the Secretary of the Interior and give to the party the rights which under the findings of fact as made by the Secretary of the Interior, he is entitled to receive.

The Secretary of the Interior is clothed with authority by Act of Congress, June 25, 1910, 36 Stat. L. 855, to determine the heirship of deceased Indians and the statute provides that his decision "shall be final and conclusive." We do not believe that Congress ever intended to confer upon the Secretary of the Interior judicial powers to the extent that if in his decision he misapplies the law to the facts which he finds to exist that such misapplication shall be final and conclusive. For instance, should he find from the evidence that the deceased left surviving him a widow, a son and a second cousin, and should hold that the second

cousin should inherit in preference to the wife and son, the miscarriage of justice would be so palpable that a court of equity ought to intervene and correct the mistake made.

Under paragraph 24 of section 24, chapter 2 of the Act of Congress of March 3, 1911, 36 Stat. L. 1091, same being the Judicial Code, jurisdiction was conferred upon the District Court of the United States, as we believe, to determine just such a controversy as this. The section as first written, reads as follows:

> "Section 24, Original Jurisdiction. The District Courts shall have original jurisdiction as follows: * * *
>
> "Twenty-fourth (of suits concerning allotments of land to Indians): Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty."

Lest there be any misunderstanding that the intention of Congress was that the decision of the courts should be binding upon the Secretary of the Interior in a proper case, the Act of Congress approved December 21, 1911, 37 Stat. L. was passed, which is as follows:

> "An Act to amend and re-enact paragraph twenty-four of section twenty-four of chapter two of an act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That paragraph twenty-four of section twenty-four of chapter two of an act entitled 'An Act to codify, revise, and amend the laws relating to the

judiciary,' approved March third, nineteen hundred and eleven, is hereby amended so as to read as follows:

"'Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

"'And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.'

"Approved, December 21, 1911."

This Act of Congress was passed subsequent to the Act of Congress conferring jurisdiction upon the Secretary of the Interior to make findings of heirship quoted above. If there is any conflict between the two, the later act must govern. The identical proposition was before the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Dixon* v. *Cox*, 268 Fed. 286. In the opinion Mr. Justice Sanborn says:

"The second question is: Did the complaint or proof in this suit set forth a cause of action in equity to avoid the secretary's decision for fraud, error of law, or absence of substantial evidence to sustain it? Whether or not the weight of evidence in substantial conflict sustains one or the other side of an issue of fact is a question upon which the final decision of the secretary in a case of this character is generally final

and conclusive; but his decision upon this issue of heirship, like the decision of the land department, of the Dawes Commission, and of other quasi judicial tribunals, may undoubtedly be avoided by a suit in a court of equity on account of fraud which induced it, on account of error of law upon facts found, conceded or established beyond dispute at the hearing before him, or on the ground that at the close of such hearing there was no evidence to support his finding on a material issue of fact which controlled the result. *James* v. *Germania Iron Company*, 107 Fed. 597, 600, 601, 46 C. C. A. 476, 480; *Howe* v. *Parker*, 190 Fed. 738, 746, Ill. C. C. A. 466, 474."

In that particular case the court held that though the District Court had jurisdiction, the Secretary of the Interior had committed no error in the decision determining the heirship of the deceased allottee and entered judgment in the case affirming the decision of the lower court which dismissed the bill, *not for want of jurisdiction, but for want of equity.* THE CASE WAS CONSIDERED BY JUSTICE SANBORN ON ITS MERITS, JUST AS WE ASK THIS COURT TO DIRECT THE LOWER COURT TO DO IN THIS CASE.

In his opinion in the case at bar (R. 14), the court referred to *Dixon* v. *Cox, supra,* and to its holding that the Federal District Court had jurisdiction to avoid by decree the decision of the Secretary of the Interior on a question of heirship for error of law applied to the facts conceded, found or undisputed. But the court refused to follow that decision, but took the position that the decision

of this court in *Hallowell* v. *Commons,* 239 U. S. 506, was to the effect that the Federal District Courts had no jurisdiction in such a case as the one at bar. But we do not so understand the effect of the decision in this case. In *Hallowell* v. *Commons, supra,* the action was pending when the Act of Congress, June 25, 1910, 36 Stat. L. 855, conferring jurisdiction upon the Secretary of the Interior, was passed. The District Court properly dismissed the proceeding. Its decision was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, which was also affirmed by the Supreme Court. In that case the plaintiff sought to have the court hear evidence and determine the facts with reference to whether he was entitled to inherit from the deceased allottee, which is a far different matter from asking the court to say that when the Secretary of the Interior has heard evidence and determined the facts, that upon the facts determined by him he has misapplied the law and given the property to the wrong party.

The Commissioner of the General Land Office under the supervision of the Secretary of the Interior is authorized to determine who is entitled to receive patent for public lands. Likewise many other executive departments are given authority to administer the law in their departments, but by a long line of decisions, this court has held that where they misapply the law to the facts found that such erroneous decision shall be corrected. In the case of *Sanford* v. *Sanford,* 138 U. S. 642, which was a case

concerning the disposition of the public lands by the Department of the Interior through the Commissioner of the General Land Office, in an opinion by Mr. Justice Field, the court says:

> "But where the matters determined are not properly before the department, or its conclusions have been reached from a misconstruction by its officers, of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected. *Quinby* v. *Conlan,* 104 U. S. 420, 426 (26:800, 802); *Baldwin* v. *Stark,* 107 U. S. 463, 465 (27:526). In such cases a court of equity only exercise its ordinary jurisdiction to prevent injustice from a misconstruction of the law or the machinations of fraud."

We take it that there will be but little contention but that the Secretary of the Interior erred in his application of tht law to the facts which he found to exist in the case. Indian marriages, when entered into prior to allotments according to the customs of the tribe, have by all courts been held to be valid. Citizenship was conferred upon Indians by the General Allotment Act, *supra,* which provided that upon completion of their allotments

> "each and every member of the respective bands or tribes of Indians, to whom allotments have been made, shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they reside." 24 Stat. L. 390.

By the Indian Appropriation Act of April 21, 1904, 33 Stat. L. 318, the reservation lines of the Ponca Indians were abolished and the territory composing that reservation was attached to Kay and Noble counties in Oklahoma territory. In section 2 of the Act of Congress of June 16, 1906, 34 Stat. L. 268, commonly known as the "Oklahoma Enabling Act," it was provided that all Indians residing in the Territory of Oklahoma (with other people) should have the right to vote. Citizenship was thus conferred upon Henrietta First Moon and Little Soldier, first, when their allotments were completed under the provision of the General Allotment Act, and again, when Congress passed the act enabling Oklahoma to become a state. The citizenship of the Indians of Oklahoma has been recognized by a long line of Oklahoma decisions. Among them we find the following:

Cox v. *Cox,* 95 Okla. 14.

Wah-tsa-e-o-she et al. v. *Webster,* 69 Okla. 257.

In each of these cases it was held that Indian divorces just such as existed in the case at bar were invalid. In the case of *Cox* v. *Cox,* supra, the court says:

> "Although the wife deserts her husband, and enters into a bigamous marriage with another, with whom she lives until her husband's death, in the absence of a statute, she cannot be precluded or estopped from asserting her interest in his estate." 3rd paragraph syllabus.

And in the case of *Wah-tsa-e-o-she et al.* v. *Webster,*

the court held that an Osage Indian had acquired citizenship under the Oklahoma Enabling Act and because of having thus acquired citizenship, was bound by the laws of the State of Oklahoma with reference to divorce matters and that a so-called "Indian divorce" was absolutely void. It so happened that in that case there had been a marriage by Indian custom without a ceremony, between two Osages, prior to the Oklahoma Enabling Act. The court held that such marriage, because entered into according to the tribal customs then in existence, was valid, but that after citizenship was acquired by virtue of the provisions of the Enabling Act, a divorce could be obtained only by going through the ceremonies which the laws of the State of Oklahoma provided. See to the same effect:

Moore v. *Wa-me-go et al.*, 83 Pac. 400, 72 Kans. 169.

As to citizenship of Indians generally allotted under the provisions of the General Allotment Act, *supra, see* further:

In re: *Heff*, 197 U. S. 488;

U. S. v. *Nice*, 241 U. S. 591;

State v. *Lott*, 123 Pac. 491, 21 Idaho 646.

We have not fully briefed the proposition of the secretary's having committed error, for we realize that the only question before the court upon this appeal is the question of the jurisdiction of the District Court to consider whether or not the secretary misapplied the law to the facts which

he found to exist. But we have referred to it briefly only for the purpose of showing that our proceeding in the case below is not trivial and that we have a real ground for complaint as to the decision which the secretary rendered. We certainly feel that under the provisions of the Judicial Code above quoted and under the authority of *Dixon* v. *Cox, supra,* that the District Court committed error in holding that it had no jurisdiction of the case, and we confidently feel that this Court will reverse the decision of the lower court and decree that it had jurisdiction and that it will remand the case to the District Court for further hearing upon the merits of the case.

Respectfully submitted,

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